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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| RONALD HOGAN et al.,<br>Plaintiffs and Appellants,<br>v.<br>FIRST TECHNOLOGY FEDERAL CREDIT UNION,<br>Defendant and Appellant. | A151266, A152170<br><br>(Sonoma County<br>Super. Ct. No. SCV254820) |

This opinion addresses an appeal brought by Ronald and Victoria Hogan[1] and a cross-appeal brought by First Technology Federal Credit Union (First Tech).

This is the third appeal by the Hogans arising from their lawsuit against First Tech and other defendants.[2] In this appeal, the Hogans challenge trial court orders (1) sustaining First Tech's demurrer without leave to amend to their claim of "unilateral rescission" and (2) granting First Tech's motion for summary adjudication of their claim of "foreclosure of purchasers' lien." The Hogans' appeal lacks merit.

First Tech filed a cross-complaint against the Hogans alleging claims of unsecured debt and fraud. After First Tech presented its case in a court trial, the court granted the

[1] We refer to Ronald Hogan and Victoria Hogan together as the Hogans and, individually, by first name only for brevity's sake and with no disrespect.

[2] The first two appeals arising from this particular lawsuit are *Hogan, et al. v. Cenlar FSB, et al.* (A142702, Jan. 13, 2016) [nonpub. opn.] (*Cenlar*) and *Hogan, et al. v. State Farm General Ins. Co.* (A145482, Mar. 29, 2018) [nonpub. opn.] (*State Farm*).

Hogans' motion for a judgment of nonsuit and entered a "judgment after court trial." First Tech appeals, arguing nonsuit was improper, and it is entitled to entry of judgment on both its claims, among other things. We reject the contention that First Tech is entitled, as a matter of law, to judgment in its favor, but we reverse the judgment of nonsuit as to First Tech's claim for unsecured debt and remand. Because we partially reverse the "judgment after court trial," the award of attorney's fees to the Hogans is also reversed. We further reverse the orders on First Tech's motions for attorney's fees and costs, and remand. Finally, we reject First Tech's request for remand to a different judicial officer.

In summary, the orders sustaining First Tech's demurrer without leave to amend and granting its motion for summary adjudication are affirmed. The judgment of nonsuit is reversed as to First Tech's unsecured debt claim only, and the matter is remanded for a determination on the merits. The orders on attorney's fees and costs are reversed. The orders denying First Tech's motions for attorney's fees and taxing costs are remanded for further proceedings consistent with this opinion.

## FACTUAL AND PROCEDURAL HISTORY

*The Hogans' Prior Litigation Related to the Purchase of the Gardenview Property*[3]

In May 2000, the Hogans "purchased a home on Gardenview Place in Santa Rosa (the Gardenview property) for a price of $499,000." (*Hogan v. DeAngelis Const., Inc.* (A117321, A118257, A120840, May 20, 2009 [nonpub. opn.]) p. 1 (*Hogan I*).)

[3] Many of the facts in this section are taken from our prior opinions involving (1) the Hogans' underlying lawsuit, initiated in 2002, related to their purchase of a home in Santa Rosa, and (2) the current lawsuit in which the Hogans have attempted to avoid foreclosure and rescind homeowners insurance policies, among other things. (See *State Farm, supra*, at p. 1; *Cenlar, supra*, at pp. 1–2.) We refer to the Hogans' underlying lawsuit generally as *DeAngelis*. (See *State Farm, supra*, at p. 2.) Most recently, we summarized the long procedural history of the *DeAngelis* case in *Hogan v. DeAngelis Construction, Inc*. (A146057, A146582, A147273, May 17, 2018) [nonpub. opn.] (*Hogan V*), and we often quote from that opinion rather than chronicling the facts and procedural history yet again. (See Cal Rules of Court, rule 8.1115(b)(1) [an unpublished opinion may be relied on "[w]hen the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel"; *K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 172, fn. 9 [an unpublished opinion may be cited "to explain the factual background of the case"].)

"In August 2002, the Hogans filed a complaint against the sellers and property developers . . . (collectively, the Developers), as well as the real estate agents [(realtor defendants)] for the sale . . . . The Hogans sought both legal damages and relief based on rescission." (*Hogan I, supra,* at p. 1, fn. omitted.)

Rescission of the Gardenview Property Purchase Agreement

"[T]he Developers formally accepted the rescission and offered to restore the Hogans' consideration. In May 2004, the superior court filed an order confirming that the Gardenview purchase agreement was rescinded. Nevertheless, the Hogans retained possession of the Gardenview property and the litigation continued, culminating in a jury trial and [an] amended judgment." (*Hogan I, supra*, at pp. 1–2.)

The amended judgment filed in June 2007 provided, in part, that the Hogans were to recover from the Developers a specified amount of money for consequential damages; that the Developers were to pay the existing mortgage debt on the Gardenview property in the amount of $417,000; and that the Hogans were to return the Gardenview property to the Developers. (*Hogan V, supra,* at pp. 3–4.)

*Hogan I*

In May 2009, this court decided *Hogan I* in which "[t]he Hogans challenged the judgment for rescission. [Citation.] We rejected that challenge, stating that 'a straightforward application of the rescission statutes compels the conclusion that the Gardenview property purchase agreement was unilaterally rescinded by the Hogans' in 2002, when the . . . complaint was served on the [D]evelopers." (*State Farm*, *supra*, at pp. 3–4.) "[W]e affirmed the amended judgment but remanded the case to the trial court with instructions 'to modify the amended judgment . . . .' [Citation.] We also declined to modify the amended judgment 'to clarify that the Hogans must return the . . . property as a condition of obtaining relief based on rescission,' holding that 'the amended judgment clearly *does* require the Hogans to return the . . . [Gardenview p]roperty." (*Hogan V, supra,* at p. 4.)

In April 2010, "the trial court filed an order modifying the judgment in accordance with *Hogan I*. The order (which we refer to as the modified amended judgment or the

judgment) provides, inter alia, 'The Hogans are entitled to $278,446.97 from any or all of the Developer Defendants . . . *at the time that* Plaintiffs return the real property at 2014 Gardenview Place, Santa Rosa, California, to Developer Defendants.' (Italics added.) Further, '[t]he Developer Defendants must also remove as an obligation of the Hogans the remaining debt of $417,000 on the real property *at the same time as* payment of the consequential damages in exchange for the return of the real property, including, but not limited to, any debt for mortgage, deed of trust, or the equivalent, not to exceed the amount of $417,000, the amount of the loan which existed in June 2007 at the time of entry of the Judgment.' (Italics added.)" (*Hogan V*, *supra*, at p. 4.)

*Hogan II*

In April 2012, this court decided a second set of appeals, *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A128451, A130351, Apr. 18, 2012) [nonpub. opn.] (*Hogan II*). In *Hogan II*, "we expressed our dismay 'that the Hogans continue to retain possession' of the [Gardenview] property and rejected the Hogans' attempts to revoke or invalidate their rescission and their related efforts to obtain damages without satisfying the return condition. We held that 'although the modified judgment allows the Hogans to recover consequential damages relating to the rescission, those monies *are not due unless and until the Hogans return the Gardenview property* to the Developers.' [Citation.] We likewise held that the realtor defendants 'are not required to pay consequential damages unless and until the Hogans' [*sic*] return the . . . property to the Developers.' [Citation.] And we held that the accrual of interest on the award does not start unless and until the Hogans return the property." (*Hogan V*, *supra*, pp. 1–2, italics added.)

"Despite this guidance, [the Hogans] refused to return the [Gardenview] property, stopped paying the mortgage, and refused to execute the judgment. The [Gardenview] property was sold in nonjudicial foreclosure proceedings." (*Hogan V*, *supra*, p. 2.)

*The Current Litigation Involving Lender First Tech*

The Hogans' First and Second Mortgages on the Gardenview Property

When the Hogans bought the Gardenview property in 2000, part of the purchase price was financed by a loan secured by a deed of trust. The Hogans refer to this loan and subsequent refinancing loans secured by a deed of trust as the "first mortgage."[4]

On May 3, 2002, Ronald obtained from First Tech a home equity line of credit (HELOC) secured by a deed of trust on the Gardenview property. The Hogans refer to the HELOC as the "second mortgage."

"In January 2009, the Hogans obtained a $417,000 loan from Taylor, Bean & Whitaker Mortgage Corp. [(TBW)] that was secured by a deed of trust against the Gardenview property." (*Cenlar, supra,* at p. 2.) This was the fourth time the Hogans refinanced their first mortgage on the Gardenview property. On January 9, 2009, the Hogans signed a subordination agreement with First Tech in order to obtain the $417,000 refinancing loan from TBW.[5]

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[4] "A real property loan generally involves two documents, a promissory note and a security instrument. The security instrument secures the promissory note. This instrument 'entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust (with the debtor and creditor known as trustor and beneficiary and a neutral third party known as trustee). The security instrument may also be a mortgage (with mortgagor and mortgagee, as participants).' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235.) "[T]he function and purpose of deeds of trust and mortgages are identical, and 'except for the passage of title for the purpose of the trust, [deeds of trust] are practically and substantially only mortgages with a power of sale. . . .' " (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 816.)" The terms "deed of trust," "trustor," and "beneficiary" are sometimes used interchangeably with the terms "mortgage," "mortgagor," and "mortgagee" (e.g., *Rothwell, supra,* at p. 1235, fn. 2), and in this opinion, the term "mortgage" is used to refer to a loan agreement secured by a deed of trust.

[5] The subordination agreement provided that First Tech subordinated its "lien or charge of the deed of trust . . . to the lien or charge of the deed of trust in favor of [TBW]." Each of the four times the Hogans refinanced their first mortgage, First Tech agreed to subordinate the HELOC to the first mortgage.

TBW's "deed of trust was assigned to Nationstar [Mortgage LLC (Nationstar)] in June 2013. In July 2013, Cenlar [FSB (Cenlar)], as attorney-in-fact for Nationstar, executed a substitution of trustee that substituted Northwest as the trustee under the deed of trust." (*Cenlar*, *supra*, at p. 2.)

"On September 16, 2013, Northwest recorded a notice of default stating that the Hogans were in default under the loan. On December 20, 2013, Northwest recorded a notice of trustee's sale, which scheduled a foreclosure sale of the Gardenview property" in January 2014. (*Cenlar*, *supra*, at p. 2.)

The Hogans' Lawsuit Against First Tech and Others

On December 31, 2013, the Hogans filed a complaint against First Tech, Nationstar, Cenlar, and additional defendants. At the same time, the Hogans "filed an ex parte application for a temporary restraining order to enjoin the foreclosure sale scheduled for January 23, 2014. The trial court granted the Hogans' request for a temporary restraining order that same day. However, on February 7, 2014, the trial court dissolved the temporary restraining order and denied the Hogans' request for a preliminary injunction, stating that the Hogans 'have failed to present competent evidence that they would prevail on any of the causes of action they have pled against the Defendants and, as such, are not entitled to a preliminary injunction.' " (*Cenlar*, *supra*, at p. 2.)

In April 2014, the Hogans filed a first amended complaint (FAC), after First Tech and other defendants filed demurrers to the original complaint but before the trial court ruled on the demurrers. First Tech and other defendants filed demurrers to the FAC, which the trial court sustained in part.

In October 2014, the Hogans filed a second amended complaint (SAC), and another round of demurrers followed. Again, the trial court sustained the demurrers in part.

In May 2015, the Hogan filed a third amended complaint, asserting two claims against First Tech: (1) "Foreclosure of Purchasers' Lien Under Civil Code § 3050" and (2) declaratory relief.[6]

In their first cause of action, the Hogans alleged they had a lien on the Gardenview property arising under Civil Code[7] section 3050. They alleged they recorded a "Notice of Lien" on October 1, 2013, and the Gardenview property was sold at auction a year later on October 16, 2014.[8] The Hogans sought a court order declaring their lien superior to the first and second mortgages.

In their second cause of action, the Hogans sought "a judicial determination that they did not breach the terms of either the Cenlar or First Tech promissory notes and deeds of trust."[9]

First Tech's Cross-Complaint Against the Hogans

In May 2015, First Tech filed a cross-complaint against the Hogans.[10] First Tech asserted two claims: (1) unsecured debt, and (2) fraud and deceit.

In the first cause of action seeking a judgment on unsecured debt, First Tech alleged Ronald owed it $141,890.32 on the HELOC. In the second cause of action for fraud and deceit, it was alleged that, after "First Tech extended the HELOC credit facility to [Ronald] Hogan," the Hogans failed to inform First Tech that a trial court order in 2004 rescinded the Hogans' purchase of the Gardenview property and a 2007 judgment ordered the Developers to pay the mortgages on the Gardenview property, including $100,000 owed to

[6] The third amended complaint is the operative complaint. Our discussion of the Hogans' claims addresses the claims alleged in their third amended complaint unless an earlier pleading is specified.

[7] Further undesignated statutory references are to the Civil Code.

[8] As will be seen, First Tech purchased the Gardenview property at the foreclosure sale for $488,698.40.

[9] The Cenlar promissory note and deed of trust is the 2009 TBW refinancing loan that was later acquired by Nationstar; it is also referred to as the first mortgage.

[10] The operative complaint is the first amended complaint filed June 17, 2015.

First Tech on the HELOC. First Tech further alleged that, in connection with the 2009 refinancing loan, the Hogans made "sworn false representations that they owned the [Gardenview] Property, and that there was no pending litigation affecting the Property" to TBW, which, in turn, induced First Tech to subordinate its HELOC deed of trust to the deed of trust given by the Hogans to secure refinancing of the first mortgage.

First Tech's Motion for Summary Adjudication

In November 2016, First Tech moved for summary adjudication as to the two claims the Hogans asserted against First Tech and its own claim for unsecured debt against Ronald.

On March 7, 2017, the trial court granted First Tech summary adjudication of the Hogans' first cause of action (foreclosure of "Purchasers' Lien"), finding the undisputed evidence showed the 2009 TBW refinancing loan was senior to the Hogans' statutory lien and, therefore, the foreclosure sale on the TBW loan extinguished the Hogans' lien.

The court denied First Tech's motion for summary adjudication of the Hogans' second cause of action against First Tech for declaratory relief and First Tech's first cause of action against Ronald for unsecured debt, finding there was a triable issue as to whether the "DeAngelis Defendants [i.e., the Developers] were, by court order, the parties to bear responsibility for payment, or non-payment, of the existing mortgages from the date of rescission in 2004."

On March 10, 2017, the Hogans' attorney informed the court that the Hogans had settled with Cenlar and Nationstar and that they would "dismiss without prejudice their final claim on declaratory relief" against First Tech. This left unresolved only First Tech's cross-complaint against the Hogans.

Trial and Nonsuit Motion in First Tech's Lawsuit

On March 14, 2017, a court trial began on First Tech's two claims against the Hogans.

After First Tech rested on the liability phase of the trial,[11] the Hogans moved for a judgment of nonsuit. The Hogans' attorney argued First Tech's claim for unsecured debt failed because documents from *DeAngelis* showed that DeAngelis (i.e., the Developers), not the Hogans, were responsible for the second mortgage "after the May 2004 rescission order and certainly after the Court of Appeals [*sic*] confirmed that the Hogans were not the owners of the property . . . ." He argued First Tech's claim for fraud failed because the Hogans had no legal duty to disclose to First Tech anything that occurred after the HELOC was extended and because First Tech "could not have relied on any statements the Hogans made" in relation to the four subsequent subordination agreements.

The trial court granted the Hogans' nonsuit motion. The court agreed with the Hogans that the unsecured debt claim failed, stating the HELOC "by court order reverted to DeAngelis, and . . . it would appear to this Court that First Tech has the wrong cross-defendant in this case, that the correct cross-defendant in this case is DeAngelis." As to the fraud claim, the court did not believe there was sufficient evidence of willful misrepresentations or omissions by the Hogans.

The Hogans and First Tech moved for attorney's fees. The trial court denied First Tech's request and granted the Hogans,' ordering First Tech to pay the Hogans $15,000 for attorney's fees.

## DISCUSSION

### A. *The Hogans' Appeal*

We address the Hogans' contentions in the order presented in their opening brief.

#### 1. Summary Adjudication of the Hogans' Section 3050 Lien Claim

In their first claim against First Tech, the Hogans alleged they had a lien on the Gardenview property under section 3050, and they asked the court "to declare the statutory lien superior to any and all liens or encumbrances by Cenlar, Nationstar and/or First Tech and confirm a foreclosure of [their] Purchasers lien."

[11] On the second day of trial, the court announced it would bifurcate trial, with liability to be determined before damages.

The trial court granted First Tech's motion for summary adjudication of this claim. The court relied on First Tech's evidence establishing "the [2009] TBW Loan was made in good faith and without notice of [the Hogans'] lien or the rescission," which, in turn, meant TBW's lien was senior to the Hogans' later-filed lien. The court further determined, "Given that the TBW Loan is senior to [the Hogans'] lien, the foreclosure sale on the TBW Loan extinguishes [the Hogans'] lien."

We review a grant of summary adjudication de novo to determine "whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; § 437c, subd. (c).) We agree with the trial court.

a. *A Lender's Lien Taken Without the Lender's Knowledge or Notice of a Competing Vendee's Lien Has Priority Over the Vendee's Lien*

Section 3050 provides, "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." The Hogans refer to their asserted lien under this statute as a "purchasers' lien." A lien under section 3050 is also sometimes called a vendee's lien.[12] (E.g., 4 Miller & Starr, Cal. Real Estate (4th ed. 2019) § 10:121, p. 10–439 (4 Miller & Starr).) Section 3046 provides for an analogous vendor's lien.[13]

[12] The premise of the Hogans' claim appears to be that there was a "failure of consideration" on the part of the sellers in the purchase agreement for the Gardenview property and, therefore, the Hogans have a "special lien" on the Gardenview property under section 3050 "for such part of the amount paid as [they believe they are] entitled to recover back." They further sought an order to "confirm" a foreclosure of their lien, even though the foreclosure on TBW's assigned deed of trust occurred in October 2014, more than six months before the Hogans filed their operative pleading.

[13] "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." (§ 3046.)

Section 3048 provides, "The liens defined in sections 3046 [vendor's lien] and 3050 [vendee's lien] are valid against every one claiming under the debtor, *except a purchaser or incumbrancer in good faith and for value*." (Italics added.)

"An encumbrancer in good faith and for value means a person who has taken or purchased a lien, or perhaps merely the means of obtaining one, and who has parted with something of value in consideration thereof. [Citation.] In addition, a 'good faith' encumbrancer is one who acts without knowledge or notice of competing liens on the subject property." (*Brock v. First South Savings Assn*. (1992) 8 Cal.App.4th 661, 667, italics omitted (*Brock*).)[14] Under section 3048, a good faith encumbrancer's lien has priority over a competing vendee's lien. (See *id*. at p. 667 [observing that, if the appellant were a good faith encumbrancer, then its lien would have priority over the respondent's competing vendee's lien].)

Further, "[a] good faith encumbrancer for value who first records takes its interest in the real property free and clear of unrecorded interests." (*First Fidelity Thrift & Loan Assn. v. Alliance Bank* (1998) 60 Cal.App.4th 1433, 1440 (*First Fidelity*); see § 1214.[15])

b. *TBW's Lien Had Priority Over the Hogans' Asserted Vendee's Lien*

In support of its motion for summary adjudication of this claim, First Tech submitted evidence showing the following. In January 2009, the Hogans represented to TBW that they held lawful title to the Gardenview property and that there were no liens on the Gardenview property other than the encumbrances of record.[16] On January 15, 2009,

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[14] For purposes of this discussion, a deed of trust is a lien. (See, e.g., § 2898, subd. (b) [referring to "the lien of a mortgage or deed of trust"]; *Brock, supra,* 8 Cal.App.4th at p. 665 [referring to purchase-money deed of trust as a lien].)

[15] "Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action." (§ 1214.)

[16] In the deed of trust for the Gardenview property executed for the 2009 TBW refinancing loan, the Hogans, as borrowers, covenanted that they were "lawfully seised of

TBW recorded a deed of trust on the Gardenview property to secure the refinancing loan on the first mortgage. At the time the Hogans obtained refinancing from TBW, they did not believe they had a vendee's lien on the Gardenview property, and they did not "discover" their claim to a statutory lien until around 2012. And, as the Hogans themselves alleged, they did not record a "Notice of Lien," claiming a lien on the Gardenview property based on section 3050, until October 1, 2013, more than four years after TBW filed its deed of trust.

First Tech's evidence and the Hogans' own allegations show that, when it refinanced the first mortgage and accepted the deed of trust on the Gardenview property in 2009, TBW had no notice or reason to know the Hogans would later "discover" and assert a competing vendee's lien. As a result, TBW was a good faith encumbrancer under section 3048, the Hogans' later-filed lien under section 3050 was not valid against it, and TBW's lien had priority over the Hogans' asserted vendee's lien. (§ 3048; *Brock, supra,* 8 Cal.App.4th at p. 667.) Further, as a good faith encumbrancer who recorded its interest first, TBW took its deed of trust "free and clear of unrecorded interests." (*First Fidelity, supra,* 60 Cal.App.4th at p. 1440.)

c. *The Hogans Fail to Demonstrate a Triable Issue as to Whether TBW Had Notice or Knowledge of Their Asserted Vendee's Lien*

The Hogans agree that TBW's lien would have priority over their asserted vendee's lien if TBW had no notice of the vendee's lien when it accepted the deed of trust for the 2009 refinancing loan, but they argue there is a triable issue as to whether TBW had such notice.[17] They claim constructive notice to TBW may be inferred from "evidence the

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the estate hereby conveyed and ha[ve] the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record," and they warranted and promised to defend "generally the title to the Property against all claims and demands, subject to any encumbrances of record."

[17] The Hogans argue in their reply brief at some length that their vendee's lien came into being long before they recorded it in October 2013. But this is irrelevant; the only issue is whether TBW had notice of the asserted vendee's lien when it accepted the deed of trust in January 2009. If TBW did not have notice, then the Hogans' asserted lien was not valid against TBW pursuant to section 3048 even if the lien arose in 2002 or even in 2000.

lender knew Hogan's [*sic*] had equity and that the Hogan's [*sic*] house was sold to them using a contract." (Bolding and italics omitted.) This argument fails. The evidence cited by the Hogans would not have put TBW on notice that the Hogans had an unrecorded vendee's lien on the Gardenview property. To the contrary, the sales contract gave TBW notice that the Hogans *held title* to the property.[18] TBW would have no reason to suspect the Hogans might later claim a lien on the Gardenview property since it would make no sense to put a lien on one's own property. "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." (§ 2872.) There is no value and therefore no purpose in placing a charge on one's own property.

The Hogans seem to believe they can raise a triable issue about notice simply by suggesting TBW knew or should have known about their ongoing litigation with the sellers regarding the Gardenview property. But even assuming the Hogans presented evidence that TBW had notice of the *DeAngelis* case, such evidence would not have put TBW on notice that the Hogans had a lien on the Gardenview property under section 3050. The Hogans have never asserted that they made a claim for a vendee's lien on the Gardenview property in their *DeAngelis* complaint. Nor could they, since the Hogans claim they did not discover their lien until 2012.

In short, the Hogans have not raised a triable issue as to whether TBW had notice of their section 3050 lien when it refinanced the first mortgage and accepted the deed of trust on the Gardenview property in January 2009. The undisputed evidence showed TBW was

[18] As we have seen, First Tech's evidence showed that the Hogans represented to TBW in 2009 that they held lawful title to the Gardenview property and that there were no liens on the property other than the encumbrances of record. Evidence the Hogans submitted in opposing summary adjudication (a declaration from mortgage broker Kevin Mulcahy) likewise emphasized that the Hogans had "clear title" to the Gardenview property when they sought refinancing from TBW.

a good faith encumbrancer and, therefore, TBW's lien had priority over the Hogans' asserted lien. (§ 3048.)[19]

d. *First Tech Acquired the Gardenview Property Free of the Hogans' Asserted Vendee's Lien*

First Tech's evidence in support of its summary adjudication motion also showed it was the winning bidder at the trustee's sale of the Gardenview property, which was held on October 16, 2014. The Hogans do not dispute that the trustee's sale was a foreclosure sale under the deed of trust for the first mortgage (i.e., TBW's deed of trust, which was later assigned to Nationstar).

As a result of the foreclosure sale, First Tech took the Gardenview property free of all interests junior to TBW's lien, including the Hogans' asserted vendee's lien. This is because "[t]he priority of the deed of trust determines the priority of the title received by the purchaser at a foreclosure sale. Upon a foreclosure sale under a deed of trust or mortgage, the purchaser's title 'relates back' to the priority of the foreclosed lien, i.e., it has priority from the date of the priority of the foreclosed lien." (4 Miller & Starr, *supra*, § 10:100, p. 10–344, fn. omitted.) "The purchaser receives absolute fee title that is 'unqualified and unlimited,' and free and clear of all junior interests or encumbrances. The foreclosure sale eliminates or 'wipes out' all interests that were junior in priority to the deed of trust or mortgage; the title of the purchaser is not subject to such junior interests, even though they attached to the property before the foreclosure sale." (*Id*. at p. 10–345, fns. omitted; see *Carpenter v. Smallpage* (1934) 220 Cal. 129, 131–132 [in action to quiet title, where the defendant purchased real property at a foreclosure sale, his "title related

[19] The Hogans also appear to claim First Tech possesses evidence that may raise a triable issue of material fact, but it failed to produce such evidence in discovery. We observe that the appropriate course if they believed such was the case was for the Hogans to request a continuance to permit discovery and, if necessary, move to compel discovery. (Code Civ. Proc., § 437c, subds. (h), (i).) But the Hogans cannot prevail on appeal with mere speculation that evidence may exist that could raise a triable issue of material fact. (See *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981 ["A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact."].)

back to the deed of trust executed by [the owners/borrowers] to secure the obligations of [the lender who foreclosed] which was recorded . . . over five years before [the plaintiff] received his deed"; therefore, defendant was the owner of the property, even though his deed was recorded after the plaintiff's].)

We have seen that TBW's lien had priority over the Hogans' asserted vendee's lien. Because First Tech purchased the Gardenview property at the foreclosure sale, its title relates back to the priority of TBW's lien. And, because the foreclosure sale extinguished all liens junior to TBW's, First Tech took ownership of the Gardenview property free and clear of all junior liens—including the Hogans' asserted vendee's lien. (See *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1536 (*Cadlerock*) ["When [the borrower] defaulted on both loans, an assignee of the senior lien conducted a nonjudicial foreclosure, which extinguished the junior lien."]; *Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 437 (*Darmiento*) ["The law is clear that the trustee's deed conveys to the purchaser the trustor's interest as of the date that the deed was recorded. [Citations.] The purchaser's title is free and clear of 'all rights of the trustor or anyone claiming under or through the trustor' including liens that have attached to the property after execution of the foreclosed deed of trust."].)

The Hogans argue that First Tech was on notice of their asserted vendee's lien when it bought the Gardenview property at the foreclosure sale and, therefore, First Tech was not "an innocent good-faith purchaser." But there is no requirement that the purchaser at a foreclosure sale lack notice of junior liens in order for the purchaser to take title equal to the foreclosing lienholder. (See *Foulger v. Tidewater Southern Railway Co.* (1919) 41 Cal.App. 124, 129 [where bank that foreclosed was a "bona fide encumbrancer," the purchaser at the foreclosure sale was "protected by and sheltered under the *bona fides*" of the bank, and whether the purchaser had actual knowledge of the competing conveyance was "wholly unimportant and immaterial"].) Thus, it does not matter that First Tech was aware of the Hogans' claim to a vendee's lien at the time of the foreclosure sale.

e. *First Tech Was Entitled to Summary Adjudication*

Because the undisputed evidence showed TBW recorded its deed of trust more than four years before the Hogans recorded their vendee's lien and TBW had no notice of the unrecorded lien (the Hogans having failed to raise a triable issue as to whether TBW had notice of their vendee's lien when it accepted the deed of trust on the Gardenview property), TBW's lien had priority over the Hogans' lien pursuant to section 3048.

It is also undisputed that First Tech purchased the Gardenview property at the foreclosure sale of TBW's deed of trust (later assigned to Nationstar). Therefore, under the law of foreclosures, First Tech took the property free of the Hogans' asserted lien, which was junior to TBW's. Any vendee's lien the Hogans may have had in the Gardenview property was extinguished by the foreclosure sale. (*Cadlerock*, *supra*, 206 Cal.App.4th at p. 1536; *Darmiento*, *supra*, 230 Cal.App.3d at p. 437; 4 Miller & Starr, *supra*, § 10:100, p. 10–345.)

Accordingly, the trial court properly granted summary adjudication in favor of First Tech on the Hogans' claim of "Foreclosure of Purchasers' Lien Under Civil Code § 3050" because the Hogans have no vendee's lien on the Gardenview property.

2. Demurrer to the Hogans' Claim Based on Unilateral Rescission

The Hogans' fifth cause of action in their SAC was "for failure of consideration or mistake in support of unilateral rescission of [the second] mortgage [i.e., the HELOC] and restitution against First Tech." (Capitalization omitted.) Before we address the demurrer to this claim, we briefly describe the law of rescission and salient details from *DeAngelis*, the underlying litigation that resulted in rescission of the Gardenview property purchase agreement.

a. *Legal and Factual Background*

A party to a contract may rescind the contract "[i]f the consent of the party rescinding . . . was given by mistake" or "[i]f the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds." (§ 1689, subd. (b)(1), (2).)

Section 1691 provides the procedure for a party to rescind a contract if the facts warrant rescission. Generally, "to effect a rescission[,] a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he . . . is aware of his right to rescind: [¶] (a) Give notice of rescission to the party as to whom he rescinds; and [¶] (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.

"When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." (§ 1691.)

Section 1692 authorizes a party to sue for relief (including damages and return of consideration) for a validly rescinded contract.[20] Section 1693 provides that relief may be denied because of delay in giving notice of rescission where the delay substantially prejudices the other party.

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[20] Section 1692 provides, in full: "When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) bringing an action to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission or for any other relief to which he may be entitled under the circumstances or (b) asserting such rescission by way of defense or cross-complaint.

"If in an action or proceeding a party seeks relief based upon rescission and the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which he may be entitled under the circumstances.

"A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery.

"If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties."

In *Hogan I*, we explained, "By serving this complaint [i.e., the *DeAngelis* complaint] on the Developers, the Hogans satisfied all of the requirements of section 1691, i.e., they gave notice of rescission to the Developers and they offered to restore 'everything of value' which they had received under the contract. (§ 1691, subd. (b).) At that point, pursuant to the clear language of the rescission statutes, the Hogans declared a unilateral rescission of the Gardenview purchase agreement." (*Hogan I*, *supra*, at pp. 22–23.)

We continued, "Once the Hogans rescinded the purchase agreement and sought relief based upon that rescission, the court was required, by section 1692, to determine whether the rescission was effectual, e.g., whether there was a valid substantive ground for the rescission and/or whether delay and resulting prejudice precluded rescission under section 1693. However, these issues disappeared and the substantive validity of the rescission was established once the Developers 'accepted' the rescission in December 2003, and thereby conceded that there was a valid basis for the Hogans' unilateral rescission of the purchase agreement." (*Hogan I*, *supra*, at p. 23.)

Following our decision in *Hogan I*, the *DeAngelis* trial court filed a modified amended judgment in April 2010. It provided, among other things, that the Developers were to pay consequential damages to the Hogans at the time the Hogans returned the Gardenview property and the Developers were to " 'remove as an obligation of the Hogans the remaining debt of $417,000 on the real property at the same time as payment of the consequential damages *in exchange for the return of the real property . . . .*' " (*Hogan V*, *supra*, at p. 4, italics added and original italics omitted.)

b. *The Hogans' Claim for Unilateral Rescission of the HELOC Contract and First Tech's Successful Demurrer*

Returning to the Hogans' current lawsuit, the Hogans claimed in the SAC that, unbeknownst to them, a consequence of their unilateral rescission of the Gardenview property purchase agreement was that they no longer had to make payments on the HELOC. They alleged, "[O]nce the sale contract for the purchase of 2014 Gardenview Place was rescinded, [the Hogans] no longer had an obligation to pay any mortgage on the property, a fact that was unknown to [them] at the time. [They] continued to make

mortgage payments by mistake and ended up making mortgage payments for 12 years on the rescinded property."

The Hogans claimed, "In order to unwind the transaction and restore [the Hogans] to the status quo ante, the First Tech mortgage previously owed by [the Hogans] must be rescinded nunc pro tunc to correct the mistake or address the failure of consideration paid for a second mortgage on property that was rescinded." They also alleged they "paid the defendants substantial amounts of money only to later learn from the Courts that the obligation to make those payments belonged to a third party."

First Tech filed a demurrer, arguing this claim failed because the Hogans did not allege either that they restored everything of value which they received under the contract (i.e., the money First Tech lent Ronald) or that they offered to do so as required under section 1691.[21]

The trial court sustained the demurrer without leave to amend. The court explained, "[I]n order to obtain rescission, the [Hogans] must plead: (1) they made a mistake regarding a basic assumption upon which the contract was made; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the [Hogans]; (3) the [Hogans] did not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282.) Here, the SAC fails to present any facts to support the contention that enforcement of the instant promissory note would be unconscionable. . . . What was unconscionable about the home equity line of credit? The SAC does not cogently provide an answer to that question. Accordingly, the demurrers to this cause of action are sustained, without leave to amend."

[21] The Hogans had asserted the same rescission claim in their FAC, and the trial court had sustained First Tech's demurrer *with leave to amend* on the ground the Hogans failed to allege they offered to restore everything of value that was received under the HELOC. After quoting section 1691, the court explained, "At the very least, the [Hogans] must allege that they are willing to tender the consideration provided by the Defendants. [Citations.] The FAC fails to allege tender, and therefore these causes of actions fail."

c. *The Trial Court Properly Sustained First Tech's Demurrer Without Leave to Amend*

On appeal, the Hogans contend they alleged facts sufficient to state a claim for both failure of consideration and mistake as grounds allowing them to rescind unilaterally their second mortgage (the HELOC) with First Tech. In the alternative, they argue they should have been allowed leave to amend because there is a reasonable possibility they could cure the defect in their pleading.

We review an order sustaining a demurrer de novo, and we review the denial of leave to amend for abuse of discretion. (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1070.)

The Hogans' contention fails. First, they have not alleged any failure of consideration by First Tech in lending Ronald money under the HELOC.[22] (For example, the Hogans have never alleged that they were not allowed to draw money from First Tech under the HELOC or that the money they received from First Tech under the HELOC was counterfeit.) Assuming there was a failure of consideration on the part of the sellers in relation to the Gardenview property purchase agreement, that has no bearing on First Tech's performance under the HELOC contract. Second, for the reasons stated by the trial court, the Hogans have failed to allege mistake as a ground for rescission. As the trial court asked (rhetorically), "What was unconscionable about the home equity line of credit?" The Hogans have no satisfactory response to this question.

Moreover, the premise of the Hogans' claim is incorrect. The Hogans allege a consequence of the rescission of the Gardenview property purchase agreement was that they no longer had an obligation to pay any mortgage on the property, presumably because the modified amended judgment required the Developers to " 'remove as an obligation of the Hogans the remaining debt of $417,000 on the real property.' " (*Hogan V*, *supra*, at p. 4.) Putting aside for a moment the question whether the Developers' obligation to pay the Hogans' mortgages under the *DeAngelis* judgment had any effect on the *lenders'* ability to

[22] "Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party." (*Bliss v. California Co-op. Producers* (1947) 30 Cal.2d 240, 248.)

seek repayment of the mortgages from the Hogans, the Hogans' claim fails because they never returned the Gardenview property to the Developers, so the Developers' obligation to pay the Hogans' mortgages never arose.

We explained this in *Hogan V* as follows: "The modified amended judgment plainly conditions assumption of the mortgage upon the return of the property to the [D]evelopers. It requires the [D]evelopers to '*also* remove as an obligation of the Hogans the remaining debt of $417,000 on the real property *at the same time as* payment of the consequential damages *in exchange for the return of the real property* . . . .' (Italics added.) If the mortgage obligation accrues at 'the same time as' the damages obligation, and damages are not payable unless and until the Hogans comply with the return condition (as we held in *Hogan II*, *supra*, at pp. 12, 24–26, 29–30), the mortgage obligation is likewise 'conditioned upon the return of the property.' " (*Hogan V*, *supra*, at p. 21.)

Thus, the Hogans are incorrect in alleging they "no longer had an obligation to pay any mortgage on the property." Ronald's obligation to pay back the loan from First Tech arose from the HELOC contract between him and First Tech. The Developers have never had any obligation under the modified amended judgment in *DeAngelis* to assume payments on the HELOC because the Hogans never returned the Gardenview property. (See *Hogan V*, *supra*, at pp. 18–22 [reversing a trial court order premised on the incorrect determination that the Developers were obligated to assume the outstanding mortgage despite the Hogans' failure to return the Gardenview property].)

Because the foundation of the Hogans' claim is faulty, there is no reasonable possibility they can cure the defect through amendment. The trial court properly sustained First Tech's demurrer to the claim for unilateral rescission based on failure of consideration or mistake and did not abuse its discretion in doing so without leave to amend.

3. Remaining Issues

In their opening brief, the Hogans assert that "unsupported and incorrect 'facts' must be disregarded." (Capitalization and bolding omitted.) They do not, however, identify any "fact" they believe was unsupported or incorrect. " 'The appellate court is not required to search the record on its own seeking error.' [Citation.] Thus, '[i]f a party fails

to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Because the Hogans offer no argument or citation to the record to support their assertion, any argument that the trial court's orders were based on "unsupported or incorrect 'facts' " is waived.

The Hogans argue for the first time in their reply brief that the trial court should have granted their ex parte application for issuance of a writ of attachment, which they filed June 22, 2016. This issue is not raised in the Hogans' opening brief in either their statement of issues presented or as an argument under its own heading in the argument section. In addition, on page seven of their opening brief, the Hogans list the trial court orders they are appealing from, but the order denying their ex parte application does not appear on that list. "Arguments cannot properly be raised for the first time in an appellant's reply brief, and accordingly we deem them waived in this instance." (*Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal.App.4th 1469, 1486.)

In any event, the trial court's order denying the Hogans' ex parte application "is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) " 'A fundamental principle of appellate practice is that an appellant " 'must affirmatively show error by an adequate record. . . . Error is never presumed.' " ' " (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639.) Even if we were to consider the argument raised for the first time in the reply brief, it would fail because the Hogans do not affirmatively show error by the trial court in denying their ex parte application.

**B. *First Tech's Appeal***

First Tech contends (1) the trial court erred in granting nonsuit; (2) it is entitled to a fraud judgment against the Hogans; (3) it is entitled to recover attorney's fees from Ronald pursuant to the HELOC contract; (4) it is entitled to recover all of its recoverable court costs from the Hogans; and (5) any remand should proceed before a different judge.

1. Judgment of Nonsuit as to First Tech's Unsecured Debt Claim

"A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case." (*Carson v. Facilities Development Co*. (1984) 36 Cal.3d 830, 838 (*Carson*).) "A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. [Citations.] [¶] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded.' " (*Ibid*.)

"In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. 'The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' " (*Carson*, *supra*, 36 Cal.3d at p. 839.)

a. *Evidence at Trial and the Hogans' Motion for a Judgment of Nonsuit*

In its first claim, First Tech sought a judgment on unsecured debt, alleging Ronald owed it $141,890.32 "under the HELOC secured loan agreement."

First Tech's evidence at trial showed that Ronald signed an "open-end variable rate agreement and federal disclosure statement for loans secured by real estate" (the HELOC contract) with First Tech on May 3, 2002. (Capitalization and bolding omitted.) Under the HELOC contract, Ronald agreed to the statement, "I promise to repay you [First Tech] at your office all sums advanced to me or any person I permit to use this Account on the terms and at the rates set forth herein. Payments will continue until I have paid in full the unpaid balance, finance charges, and any other charges." (Capitalization omitted.) The HELOC contract provided for a 10-year draw period, meaning advances on the line of credit could be taken for 10 years, followed by a 10-year repayment period.

Evidence further showed that in May 2011, Ronald had a balance (the amount he owed) of $99,979.78 on the HELOC and that interest-only payments were made until May 25, 2012, after which the Hogans stopped all payment on the HELOC.

The Hogans moved for nonsuit on the ground that, under the judgment in *DeAngelis*, the Developers (and *only* the Developers) were obligated to pay the balance of the HELOC. The trial court granted the Hogans' motion, reasoning, "In essence, the trial court [in *DeAngelis*] placed DeAngelis [(i.e., the Developers)] in the shoes of Hogan at that time. Hogan ceased to be . . . owners . . . of the house, and that is where I start from in this analysis of this case. [¶] The Court of Appeals [*sic*] has clearly affirmed the trial court and the [j]ury's finding in the case stating that the Hogans no longer own the house as of 2004 and that they have no privity with First Tech at that point. The First Tech loan by court order reverted to DeAngelis, and . . . it would appear to this Court that First Tech has the wrong cross-defendant in this case, that the correct cross-defendant in this case is DeAngelis."

The court continued, "I do not find in reviewing the order of the Court regarding this matter in 2004 through 2007 to be a conditional order. Nothing in it says—although there is a timeframe when DeAngelis was to pay the debt and then a timeframe for the Hogans to vacate the property, it was clear by the Court's order that DeAngelis shall pay the existing mortgage debt in the amount of $417,000. It was not conditioned upon any other act."

b. *The Trial Court Erred in Granting the Motion for Nonsuit*

The trial court's ruling is based on an incorrect premise as we explained in *Hogan V* and reiterate above in our discussion of First Tech's properly sustained demurrer. The modified amended judgment in *DeAngelis* did *not* unconditionally require the Developers to pay the balance on the HELOC. Rather, the Developers' obligation to pay the Hogans' mortgages was conditioned on the Hogans returning the Gardenview property to the Developers, a condition that never occurred. (*Hogan V*, *supra*, at pp. 20–21.) We repeat, the Developers have never had any obligation under the modified amended judgment in *DeAngelis* to assume payments on the HELOC because the Hogans never returned the

Gardenview property. Thus, the trial court was mistaken in determining that "First Tech has the wrong cross-defendant in this case."[23]

We consider "[o]nly the grounds specified by the moving party in support of its motion" in reviewing the judgment of nonsuit. (*Carson, supra*, 36 Cal.3d at p. 839.) The Hogans' primary argument in support of their nonsuit motion—that Ronald did not have to pay off the HELOC because the Developers were responsible for the debt under the *DeAngelis* judgment—fails as a matter of law.

We note the Hogans' attorney raised a second ground for nonsuit as to the unsecured debt claim—that First Tech waived the claim by "intentional relinquishment."[24] He relied on a letter an attorney for First Tech sent the Hogans before the foreclosure sale that apparently indicated First Tech was not seeking to collect any funds from the Hogans directly and its sole remedy was to foreclose. First Tech's attorney responded at the hearing on the nonsuit motion that the attorney letter the Hogans relied on accurately stated, if First Tech foreclosed on its lien on the property, then it would not be able to sue for deficiency, but that was not the course First Tech ended up taking.[25]

" ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does

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[23] Moreover, we do not intend to imply the court's ruling would have been correct had the Developers been required to pay the Hogans' mortgages under the modified amended judgment in *DeAngelis* without the Hogans first returning the Gardenview property—which they were not. We agree with First Tech that the judgment in *DeAngelis* could not affect First Tech's rights under the HELOC contract since it was not a party in that lawsuit. "It is axiomatic that '[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.' " (*Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1462.)

[24] This argument was not addressed by the trial court.

[25] First Tech's attorney continued, "The law is that you don't elect your remedy until you actually sell the property, and First Tech never actually sold the property [i.e., it did not foreclose] so it did not waive a thing. We can provide further briefing if the Court needs that."

not leave the matter to speculation, and "doubtful cases will be decided against a waiver." ' " (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.) To sustain the nonsuit judgment on this ground on appeal, the Hogans would have to establish waiver as a matter of law. (*Carson, supra,* 36 Cal.3d at p. 839 [nonsuit judgment cannot be sustained unless judgment for the movant is required as a matter of law].) They have failed to meet this burden. The evidence showed First Tech did not foreclose on its lien and instead sued for the balance of the HELOC, conduct contrary to an intent to relinquish the right to sue. The nonsuit judgment cannot be sustained based on waiver.

Because the two grounds upon which the Hogans based their motion for nonsuit are inadequate, the judgment in favor of the Hogans as to First Tech's claim of unsecured debt must be reversed. (See *Carson, supra,* 36 Cal.3d at p. 845 ["Because all three grounds upon which the City based its motion for nonsuit are inadequate, the judgment entered in the City's favor must be reversed."].)

The Hogans argue at length that First Tech elected its remedy by buying the Gardenview property at the foreclosure sale and, therefore, it is not entitled to any deficiency judgment against them. They assert First Tech's unsecured debt claim is barred by Code of Civil Procedure section 580d.[26] The Hogans did not make this particular argument to the trial court in support of their motion for nonsuit. (See *Carson, supra,* 36 Cal.3d at p. 839 ["Only the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit."].) In any event, the argument fails because First Tech's purchase of the Gardenview property at the

[26] Code of Civil Procedure section 580d, subdivision (a), provides, "Except as provided in subdivision (b), no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property or an estate for years therein executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." Section 580d does not apply "to a junior lienor whose security has been sold out in a senior sale." (*Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43 (*Roseleaf*).)

foreclosure sale did not extinguish its right, as a sold-out junior lienholder, to recover a judgment against Ronald for the unpaid balance on the HELOC.

"The holder of a non-purchase-money note secured by a junior lien can . . . permit the senior lien to foreclose, and then enforce the note against the trustor [i.e., debtor]." (5 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 13:198, p. 13–805, fn. omitted (5 Miller & Starr); *Roseleaf*, *supra*, 59 Cal.2d at pp. 38–43; *Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 611 [bank that extended a line of credit secured by a second deed of trust could bring a personal action on the debt after the senior lienholder foreclosed and the bank's security was rendered valueless].)[27] Further, "when a junior lienor purchases the property at the foreclosure sale of a senior lien held by another creditor and then brings an action on the note formerly secured by the junior lien to recover a personal judgment against the trustor, the action is not affected by the antideficiency limitations." (5 Miller & Starr, *supra*, § 13:198, at p. 13–808, fn. omitted.)

Here, the money borrowed on the HELOC was not used to purchase the Gardenview property, First Tech's lien was junior to TBW's lien (as provided in the subordination agreement), and First Tech bought the Gardenview property at the foreclosure sale of

[27] The facts of *Bank of America v. Graves*, *supra*, 51 Cal.App.4th 607 are instructive. There, the Graveses opened a line of credit with a bank secured by a second deed of trust against their home. The Graveses defaulted, and the bank recorded a notice of default and election to sell under the deed of trust. But when the bank learned that FHLMC, the holder of the first deed of trust, had instituted foreclosure proceedings, the bank postponed its own scheduled foreclosure sale to allow FHLMC's foreclosure sale to go forward. At the FHLMC trustee's sale, the property sold for the amount owed to FHLMC. The bank then sued the Graveses for amounts due on the line of credit. (*Id*. at p. 610.) The Court of Appeal held the bank could go forward with its lawsuit. The court explained, "In California, a creditor secured by a trust deed on real property must rely on the security before enforcing the underlying debt. (§§ 580a, 725a, 726.) Even if the security is insufficient, the antideficiency statutes (§§ 580a, 580b, 580d) may limit or bar a judgment against the debtor for a deficiency. [Citation.] [¶] *However, when the value of the security has been lost through no fault of the creditor, the creditor may bring a personal action on the debt*." (*Id*. at p. 611, italics added.)

TBW's senior lien.[28] Under these circumstances, First Tech may "bring[] an action on the [HELOC contract] formerly secured by the junior lien to recover a personal judgment against [Ronald, and] the action is not affected by the antideficiency limitations." (5 Miller & Starr, *supra*, § 13:198, at p. 13–808.)[29]

c. *Remand is Appropriate*

We agree with First Tech that the trial court erred in granting nonsuit on the unsecured debt claim. Therefore, we reverse the judgment of nonsuit as to this claim. First Tech goes further in its opening brief, asserting it is entitled to a "[j]udgment on its debt cause of action without further delay." However, the bench trial on First Tech's claims was bifurcated and only the issue of liability was tried. Given the law we have set out in this opinion and the record before us, it is difficult to fathom how Ronald would not be liable for the debt he incurred under the HELOC. Because the trial court granted nonsuit after First Tech rested and before the Hogans presented their case, however, we will remand the matter for the trial court to determine liability in the first instance and damages, if necessary.[30]

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[28] It is the case that "[a] junior lienor who forecloses *its own lien* by the power of sale is barred from obtaining a deficiency judgment." (5 Miller & Starr, *supra,* § 13:198 at p. 13–804, fn. omitted, italics added.) But that is not what occurred here.

[29] As First Tech recognizes, the amount it can recover on its unsecured debt claim is limited by the fair value rule because First Tech purchased the Gardenview property at the senior lienholder's foreclosure sale. "When the junior lienor purchases the property at the foreclosure sale of the senior lien, the beneficiary of the junior lien can recover a personal judgment against the trustor on the note that was secured by the junior lien as a 'sold-out' junior lienor, but a subsequent judicial action on the note formerly secured by the junior lien is subject to the fair-value limitation. The maximum that can be collected on the note is the lesser of the amount due on the note, or the combined amounts of the senior and junior liens less the larger of either the fair value of the property or the selling price at the senior's foreclosure sale. In other words, the junior lienor is not allowed to obtain the property for a deflated price and also obtain an inequitable deficiency judgment." (5 Miller & Starr, *supra*, § 13:283, at p. 13–1233–1234, fns. omitted.)

[30] That said, we observe that Ronald and Victoria testified as witnesses in First Tech's case. The Hogans' attorney followed up with questions for Victoria, but he did not question Ronald.

2. First Tech's Claim of Fraud and Deceit

First Tech asserts it is entitled to a fraud judgment against the Hogans as a matter of law. We disagree.

a. *Evidence at Trial of Fraud*

As we have described, evidence at trial established Ronald signed the HELOC contract with First Tech on May 3, 2002. The HELOC contract provided that First Tech

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In addition, we note that, in response to First Tech's motion for summary adjudication of its unsecured debt claim, the Hogans did not dispute that Ronald executed the HELOC contract in May 2002; that "over the course of 10 years the funds were drawn down and restored several times [under the HELOC]"; that they stopped paying the HELOC in 2012; and that the balance on the HELOC as of October 2014 included $99,979.78 in principal, $10,535.54 in interest, and $1,197.10 in late fees. (The Hogans disputed an additional $11,750.21 of foreclosure expenses based on the fact "First Tech did not foreclose its lien.") The Hogans opposed the motion for summary adjudication on the grounds TBW was not a good faith encumbrancer for value and the foreclosure sale was an "irregular sham." The Hogans' arguments do not appear to be well-founded; we have explained above that TBW was a good faith encumbrancer for value, and it appears the Hogans offered no evidence or argument to support their assertion that the foreclosure sale was a sham. First Tech, however, does not argue in its opening brief that the trial court erred in denying summary adjudication of its unsecured debt claim. Arguments not raised in the opening brief are forfeited. (*People v. Roscoe* (2008) 169 Cal.App.4th 829, 840 (*Roscoe*) ["The requirements that issues be raised in the opening brief and presented under a separate argument heading, showing the nature of the question to be presented and the point to be made, are part of the ' "[o]bvious considerations of fairness" ' to allow the respondent its opportunity to answer these arguments [citation] and also . . . ' "to lighten the labors of the appellate [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." ' "].)

We also note here that First Tech has no separate argument in its opening brief that the trial court erred in granting the Hogans' motion for nonsuit *as to its fraud claim*. The first heading of the analysis section of First Tech's opening brief is "The Trial Court Erred in Granting Nonsuit," but the arguments under that heading relate to its unsecured debt claim only. Accordingly, any argument that the trial court erred in granting nonsuit as to the fraud claim is forfeited. (*Roscoe*, *supra*, 169 Cal.App.4th at p. 840; *Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246.)

could terminate the account and accelerate payment of the balance under certain default conditions.[31]

It is undisputed that Ronald and Victoria signed a subordination agreement on January 9, 2009, in which they represented to First Tech they were the owners of the Gardenview property.[32] It is also undisputed that Ronald and Victoria signed a uniform residential loan application (1003 form) on January 9, 2009, in connection with their application for their 2009 refinancing loan with TBW. In the 1003 form, the Hogans represented that there were no outstanding judgments against them, that they were not parties to a lawsuit, that they intended to occupy the Gardenview property as their primary residence, and that they had an ownership interest in the Gardenview property for the previous three years.

Troy VanRiper, a senior director of special assets management at First Tech, testified he believed "failure to disclose active or pending litigation" would cause a default under the HELOC contract. He testified that litigation divesting the borrower of title to the security would constitute default as an "action or inaction adversely affect[ing] the security or [First Tech's] rights in the security." VanRiper also believed the HELOC required Ronald to report defects in the Gardenview property that affected the value of the

[31] The HELOC contract default provision provided, in part, "You [First Tech] may terminate my Account . . . under this Agreement if: (1) there has been any fraud or misrepresentation on my part at any time in connection with this Agreement; (2) If I have failed to meet any of the repayment terms of this Agreement; or (3) my action or inaction adversely affects the security or your rights in the security. My action or inaction which adversely affects the security might include, among other things, my sale of the security without your permission, . . . or my failure to maintain the security. This list, however, is not an exclusive list of the events which may allow you to terminate my Account."

[32] Evidence further showed that Ronald signed subordination agreements in 2002 and 2004, that Ronald and Victoria signed a subordination agreement in 2007, and that, in each of the subordination agreements, the signors represented to First Tech that they owned the Gardenview property.

property[33] and, based on its condition at foreclosure, the Gardenview property had not been properly maintained and the failure to maintain was substantial.

As to the subordination agreements, VanRiper testified, if First Tech had been informed of pending litigation regarding title of the Gardenview property, it "would have hesitated . . . [and] potentially accelerated the balance and closed the line" because "[t]ypically we do not sign subordination agreements when there's any threat to the security or the value of the collateral." Asked what First Tech would have done when it received the 2007 subordination agreement if it had known that there were defects in the property, that there was litigation affecting title, and that there was a judgment requiring the borrower to move out of the property, VanRiper responded, "Same as before, decline, accelerate and close the line." The trial court asked whether that would have been the decision automatically or whether it would have been at the discretion of the First Tech mortgage servicing manager, and he answered it would be at the manager's discretion.

VanRiper testified that, when a borrower requests subordination, First Tech reviews the borrower's 1003 form given to the primary lender. If the 1003 form showed there was pending litigation, "[i]t would have been reviewed extensively and potentially declined." Generally, he explained, First Tech would obtain the 1003 form "with the subordination packet" from the lender. VanRiper could not testify about what happened specifically with the Hogans' four subordination agreements, and he did not review First Tech's "subordination approval checklist" for the Hogans' 2009 subordination request, nor did he speak with any First Tech employee personally involved in the 2009 subordination approval decision.[34] He did not know whether it was First Tech's practice to communicate directly with the borrower when a subordination agreement was requested and approved.

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[33] VanRiper testified if First Tech had known of defects in the construction of the Gardenview property, it "likely would not have signed the subordination agreement [in 2002] and would have accelerated the balance."

[34] A blank "subordination approval checklist" used by First Tech was admitted in evidence, but there was no evidence of any checklists used in connection with the Hogans' four subordination agreements. In cross-examination, VanRiper testified he was not "certain" that review of a 1003 form was a required part of the subordination approval

Susan Mary Siudzinski, a former director of servicing at First Tech, also testified about the subordination approval process. She testified the primary lender (also referred to as the first lienholder) requests a subordination and sends a loan "package," and First Tech primarily reviews equity, the appraisal value of the property, and "ownership because for HELOC you have to occupy the property." She added, "We rely on the first lienholder to provide us with the documents since they are the ones that are getting the loan."

Siudzinski testified that First Tech would not accept a subordination request if the primary lender did not provide a 1003 form. If the 1003 form indicated there were outstanding judgments against the borrower, First Tech "would reach out to the first mortgage [i.e., first lienholder] and ask for documentation pertaining to that." Similarly, if the 1003 form indicated the borrower was a party to a lawsuit, First Tech "would need to find out what kind of lawsuit and get the documentation pertaining to that." And, if the 1003 form indicated the borrower did not intend to occupy the property as her primary residence or that the borrower was not the owner of the property, the subordination request would be declined because First Tech "do[es] not offer HELOC loans that are not the owner." On cross-examination, Siudzinski testified that she did not know whether the borrower knows what information is being sent from the first lienholder to First Tech during the subordination approval process.

b. *The Trial Court's Ruling Granting Nonsuit*

As we have seen, the trial court granted the Hogans' motion for nonsuit at the close of First Tech's case on liability. With respect to the fraud claim, the court found Ronald did not have an affirmative duty to disclose the *DeAngelis* lawsuit to First Tech under the HELOC or under any of the subordination agreements. As to the first two subordination agreements signed by Ronald only, the court did not find sufficient evidence that Ronald "willfully misrepresented any items on the application."

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checklist. He also agreed that the checklist did not mention obtaining from borrowers information on lawsuits they may be involved in or obtaining information on the value or status of the security from the borrower.

The court stated, "[M]y view of this . . . is that . . . Ron Hogan[] did what he was asked to do by his mortgage lender. . . . [T]hey prepared information on his behalf. This information, as Ms. Siudzinski testified to, First Tech takes this information, they do a credit report, they get a preliminary title report, there is an appraisal of the property, all of those things are out of the control of Mr. Hogan. . . .

". . . [I]t is true that after . . . the HELOC loan was provided, that Ron Hogan then pursued his claim against DeAngelis by a lawsuit in the Sonoma Superior Court seeking rescission. I do not believe as [*sic*] the evidence from Mr. VanRiper and the documents provided to me that Ron Hogan had the affirmative duty to disclose this to First Tech . . . .

"The subordination agreement that was entered into in this case is merely one in which First Tech needs to be assured by the 1003 form that all of the paperwork is in order, that Ron Hogan stated he was the owner of the property, the application that was provided . . . by the first lender . . . . This packet, there was no testimony that it was reviewed between the first lender and Mr. Hogan, this material goes to First Tech in a typical way as all such HELOC procedures [*sic*] do, First Tech had become convinced that this was a typical . . . first loan to the property that they would subordinate their HELOC to, therefore, I don't find that there was any affirmative duty from Mr. Hogan to tell First Tech of pending litigation, that there were defects in the home, there were no liens on the property at the time except for the first loan which First Tech knew about, nor that . . . because of defects in the home, . . . he made a misrepresentation as to the appraisal. Ms. Siudzinski clearly stated that they rely upon an independent appraisal, not the individual's estimate of what they believe the house is worth.

" . . . .

"Then we come to the second subordination that was in 2004. . . . I'm not going to repeat myself. Although there was litigation pending at the time, I do not believe that the documents as provided by First Tech in this case establish any affirmative duty of the borrower to advise First Tech of the pending litigation, defects in the home, increase in the first loan, liens on the property or their independent appraisal of the property.

"Ms. Siudzinski clearly testified there is rarely, if ever, any communication with the borrower. [First Tech] go[es] off of the paperwork . . . . I believe the responsibility in this case is by the first lender in terms of developing the information and that First Tech then relies upon that information.

"I do not find that there was sufficient evidence in this case that Mr. Hogan willfully misrepresented any items on the application, that he failed to disclose in any intentional manner any of those factors that I've just listed."

Regarding the third and fourth subordination agreements, the court again found no "willful misrepresentation" by the Hogans, and it further noted these agreements were signed after the trial court's 2004 rescission decision and subsequent jury trial in *DeAngelis*.

The court stated, "[T]he third and fourth subordinations occur after the trial court renders its decision in 2004 and its further orders in 2007 after they are affirmed on appeal.[35] [¶] This creates confusion that both of the attorneys have discussed in this case. The Hogans were no longer owners of this property when they made this subordination. [¶] While, yes, it could be said that they pursued these subordinations fraudulently, I don't believe that that's what the evidence shows. I think the evidence shows in this case clearly that there was confusion as to the ownership interest in the home by the Hogans at the time, that they had not received their money from DeAngelis [i.e., the Developers] and on their own appeared to be rudderless in terms of what was going on here in the case."

c. *The Evidence Does Not Require a Judgment in Favor of First Tech*

"[W]here it appears from the record as a matter of law there is only one proper judgment on undisputed facts, [the appellate court] may direct the trial court to enter that judgment." (*Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459, fn. 7 (*Conley*).) "However, 'Unless this court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same.' "

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[35] In fact, the first appellate decision in *DeAngelis* was not issued until May 2009. (See *Hogan I*.) An amended judgment following jury trial was filed in in June 2007. (*Hogan V*, *supra*, pp. 3–4.)

(*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 76 (*Paterno*) [declining to direct the entry of judgment in favor of the appellants; "it is possible there are facts which would support a judgment in favor of [the respondent]; accordingly, it would not be appropriate to end the lawsuit [by directing judgment for the appellants] at this time."])

We reject First Tech's contention it is entitled to a judgment of fraud against the Hogans because we cannot say "from the record as a matter of law there is only one proper judgment on undisputed facts." (*Conley*, *supra*, 56 Cal.App.4th at p. 1459, fn. 7.)

" ' "The elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' " (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)

First Tech argues the Hogans committed fraud in three ways: (1) in the 1003 form provided to TBW, falsely asserting that there were no judgments against them, that they were not parties to a lawsuit, that they intended to occupy the Gardenview property, and that they owned the Gardenview property; (2) in the subordination agreement with First Tech, falsely representing that they owned the Gardenview property; and (3) failing to disclose the *DeAngelis* orders and judgments to First Tech as required either by the HELOC or because of a duty imposed when applying for subordination for each of the four refinancing loans.

(i) Information Provided to Primary Lenders

First Tech argues that the Hogans' admitted misrepresentations on the TBW loan application (1003 form) require a judgment of fraud. Since the 1003 form was submitted to TBW (not First Tech), First Tech also asserts the Hogans "understood that by making these representations to their first lenders they were indirectly making those representations to First Tech." The trial transcript First Tech cites in support of its assertion is the following testimony from Victoria:

"Q. Do you have any reason to think that during the 2004 refinancing, that you were making any indirect representations to First Tech?

"A. Yes."

The next question was "Such as what?" Victoria responded, "I gave all the information about our rescission and our case to Mr. Oken and Mr. Mulcahey at All California Mortgage and the title company."[36] She continued, "I thought they were in communication—Mr. Oken represented to me that he coordinated all the parties, the title company, the first lender, the second lender, he was the one that coordinated all the pieces of a refinance, and so my assumption whether it was accurate or not was that he was taking care of everything connected to that refinancing, including First Tech."

We cannot say this testimony requires as a matter of law findings that the Hogans knew the information in the 1003 form they submitted to TBW in 2009 was false and knew that such false information would be relied on by First Tech in deciding whether to approve TBW's subordination request. Victoria's testimony does not even directly address the 1003 form.

Further, as we read the trial court's ruling, it appears the court may have doubted that First Tech actually relied on the *Hogans'* representations when it approved the subordination agreement. Noting First Tech generally does not communicate with the borrower when subordination is sought, the court stated, "I believe the responsibility in this case is by the first lender in terms of developing the information and that First Tech then relies upon that information." The court may have found it was more likely First Tech relied on the primary lender's decision to approve refinancing as sufficient reason to agree to subordination rather than that First Tech actually relied on the Hogans' representations to the primary lenders. In any event, we cannot say First Tech's evidence established actual justifiable reliance as a matter of law.

[36] According to their declarations, Kevin Mulcahey was a mortgage broker at All California Mortgage and Lou Oken was a loan agent at All California Mortgage, and they both worked with the Hogans in helping them refinance their first mortgage in 2004 and 2007.

(ii) The Subordination Agreements

First Tech next argues the Hogans committed fraud when they signed the subordination agreements in 2007 and 2009 and represented that they were owners of the Gardenview property. The premise of this argument is that the Hogans did not own the Gardenview property in 2007 and 2009. Assuming for the sake of argument (without deciding) this premise, First Tech's argument nonetheless fails.

The trial court here found no willful misrepresentations by the Hogans and observed, "there was confusion as to the ownership interest in the home by the Hogans at the time," implying the Hogans believed they owned the Gardenview property at the times they made that representation to First Tech in the various subordination agreements.

First Tech argues that, even without an intent to defraud, the Hogans committed fraud because they stated something that was false (that they owned the Gardenview property) in order to form a contract, citing section 1572. Section 1572 defines fraud to include making a "positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true" "with intent . . . to induce [another party] to enter into the contract." (§ 1572, subd. 2.) But it appears the trial court here implicitly found the circumstances of the *DeAngelis* case were such that the Hogans' belief that they owned the Gardenview property in 2007 and 2009 was "warranted by the information" they had at that time (whether or not it was accurate). In any event, First Tech is not entitled to a judgment of fraud based on the subordination agreements because we cannot say that, as a matter of law, the Hogans' assertion that they owned the Gardenview property was made "in a manner not warranted by the information of" the Hogans at the time. (§ 1572, subd. 2.)

(iii) Nondisclosure

First Tech also argues the Hogans had an affirmative duty to disclose to First Tech the existence of the *DeAngelis* case, the 2004 order affirming rescission, and the 2007 amended judgment. The trial court found no such a duty, and we cannot say that finding was incorrect as a matter of law. The HELOC contract contained no explicit language

requiring borrowers to inform First Tech of later lawsuits, and First Tech's witnesses did not show that disclosure of such information was required.

Finally, as the Hogans point out, the trial court granted nonsuit at the close of First Tech's evidence on liability and, as a result, the Hogans did not put on a defense. Even if it appeared First Tech established fraud in its case-in-chief on liability, it would be inappropriate to direct entry of judgment in favor of First Tech when the Hogans have not presented their case. (*Paterno*, *supra*, 74 Cal.App.4th at p. 76.)

In summary, we reject First Tech's contention that it is entitled to a fraud judgment against the Hogans as a matter of law.

3. Attorney's fees

First Tech next argues it is entitled to attorney's fees for defending against the Hogans' claims and prosecuting its own claims. It relies on language in the HELOC contract and the deed of trust.

a. *Applicable Law and Standard of Review*

Generally, "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding" (Code Civ. Proc., § 1032, subd. (b)), and attorney's fees are recoverable costs when such fees are authorized by contract, statute, or law (*id.*, § 1033.5, subd. (a)(10)).

Section 1717 provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a).)

"A contractual provision for attorney's fees may be broad enough to address both contract claims (i.e., as causes of action to enforce the terms of the contract) and noncontract claims (such as tort claims). Thus, parties to a contract may agree that in the event of litigation between themselves, the prevailing party will be awarded attorney's fees

whether the litigation concerns contract or noncontract claims, or both." (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449 (*Silver*).)

"The correct application . . . of statutory and case authority respecting awards of attorney's fees presents a question of law, which we address de novo." (*Silver, supra,* 97 Cal.App.4th at pp. 448–449.) A trial court's determination whether a defendant is a prevailing party for purposes of awarding contractual attorney fees generally is within the court's discretion. (*Id*. at p. 449.)

b. *The Contractual Attorney's Fees Provisions*

In the HELOC contract, Ronald agreed to the following statement: "I own the security and there are no liens against it other than those of record on the date of this Agreement. I agree to perform all acts which you deem necessary to make the Security Instrument enforceable. I agree not to allow any other liens to exist against it and I agree to pay the costs of protecting the security, including collections costs, reasonable attorney's fees, and court costs." Ronald also agreed "to pay any reasonable costs of protecting, retaking, repairing, or selling the security, and collection costs, attorney's fees, and court costs."

In the deed of trust to secure the HELOC, Ronald agreed, "To appear in and defend any action or proceeding purporting to affect the security hereof [i.e., the Gardenview property] or the rights of powers of Beneficiary [i.e., the lender, First Tech] or Trustee, and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this Deed of Trust."

c. *The Parties' Motions for Attorney's Fees and the Court's Ruling*

As we have mentioned, this is the third appeal in the Hogans' lawsuit against First Tech. In January 2016, we dismissed the Hogans' appeal of a trial court order denying their request for a temporary restraining order in *Cenlar, supra,* A142702. First Tech then moved to recover attorney's fees incurred in "successfully defending" the trial court's order on appeal, seeking $29,226.50. In June 2016, the trial court denied the motion as premature. (See *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, 961

(*Presley*) [reversing award of attorney's fees incurred on appeal, where appeal resulted in reversal of summary judgment; the reversal was "merely an interim stage of the litigation," but award of contractual attorney's fees "must wait until the lawsuit is completely and finally decided"].)

In April 2017, First Tech filed two motions for attorney's fees. It renewed its request for attorney's fees incurred in the *Cenlar* appeal, citing the HELOC contract provisions quoted above. And it sought attorney's fees incurred in defending against the Hogans' claims in the amount of $451,217, citing the provision of the deed of trust quoted above. The Hogans filed their own motion for attorney's fees, arguing they were prevailing parties in First Tech's lawsuit against them and they were entitled to attorney's fees under the HELOC contract and deed of trust.

In an order filed in July 2017, the trial court denied First Tech's motions. The court reasoned, "All of the Hogans' actions had to do with First Tech's lien[37] against the property. A lien which arose after the trial court and the Court of Appeal ruled DeAngelis—not the Hogans—were responsible for the First Tech HELOC loan repayment. The Hogans' claims are not based on the HELOC loan which First Tech relies [on]."

In the same July 2017 court order, the Hogans were awarded $15,000 for attorney's fees incurred in the trial of First Tech's claims.

d. *The Order Awarding the Hogans Attorney's Fees is Reversed*

Initially, we observe the trial court awarded the Hogans attorney's fees on the premise they were the prevailing parties on First Tech's cross-complaint and "The Cross-Complaint clearly invoked the attorney fees provision contained in the loan." Since we reverse the judgment of nonsuit as to First Tech's unsecured debt claim, we also reverse the award to the Hogans of $15,000 for attorney's fees. (See *Southern Pacific Transportation Co. v. Mendez Trucking, Inc*. (1998) 66 Cal.App.4th 691, 696 ["Since we reverse the judgment below, respondent is no longer the prevailing party, and thus not

[37] In context, it appears the trial court meant that "All of the Hogans' [claims] had to do with [*their*] lien against the property," not First Tech's lien on the property.

entitled to attorney fees . . . ."]; *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1390 ["In view of our reversal of the judgment, the order awarding attorney fees must also be reversed"].)[38]

e. *First Tech is Entitled to Attorney's Fees Incurred Defending Against the Hogans' Lawsuit*

In the Hogans' lawsuit, First Tech successfully demurred to most of the Hogans' claims; First Tech won summary adjudication of the Hogans' claim for foreclosure of a vendee's lien; and, following the trial court's ruling on First Tech's motion for summary adjudication, the Hogans dismissed their sole remaining claim for declaratory relief before trial. Thus, in the Hogans' lawsuit, First Tech is the prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4), as "a defendant in whose favor a dismissal is entered" or as "a defendant where neither plaintiff nor defendant obtains any relief."

The trial court denied First Tech's motions for attorney's fees on the ground the Hogans' claims did not arise from the HELOC contract and, therefore, the attorney's fees provision did not apply ("The Hogans' claims are not based on the HELOC loan which First Tech relies [on]."). But the attorney's fees provisions in the HELOC contract and deed of trust are broader than a fee provision covering only actions to enforce the contract.[39] Ronald agreed "not to allow any other liens to exist against [the security] and

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[38] We reverse the judgment of nonsuit as to First Tech's claim *against Ronald* for unsecured debt, and we remand that matter for further proceedings. First Tech's only claim against Victoria, however, was for fraud, and we do not grant First Tech appellate relief on that claim. Thus, in First Tech's lawsuit against the Hogans, it appears Victoria is a prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4), as "a defendant in whose favor a dismissal is entered" or as "a defendant where neither plaintiff nor defendant obtains any relief." We observe Victoria is free to seek attorney's fees on remand, but we express no opinion on whether there are contractual provisions authorizing recovery of attorney's fees incurred in defending against First Tech's fraud claim.

[39] We also note that at least some of the Hogans' claims did arise from the HELOC contract. The Hogans' claim for unilateral rescission of the HELOC contract (fifth cause of action in the SAC) was a claim based on the contract. (See *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 549 [claim for rescission of contract is a claim "on a contract" under section 1717 for purposes of enforcing a contractual attorney's fees provision].) The claim for declaratory relief in the form of a declaration that the Hogans

. . . to pay the costs of protecting the security, including collections costs, reasonable attorney's fees, and court costs." And to "defend any action or proceeding purporting to affect the security . . . ."

In *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 544, a loan agreement contained a similar provision that the borrower "would 'pay all costs of collection including, . . . reasonable attorneys' fees, and all expenses in connection with the protection or realization of the collateral securing th[e] Note. . . .' " After the lender successfully defended against the borrower's action to set aside a foreclosure, the trial court awarded the lender attorney's fees pursuant to the fees provision in the loan agreement, and the Court of Appeal upheld the award. (*Id*. at pp. 544, 546–547.) And, in other cases, lenders have recovered—pursuant to fee provisions in deeds of trust—attorney's fees incurred defending against borrowers who brought actions similar to the Hogans' lawsuit attempting to forestall or challenge foreclosure. (E.g., *Passanisi v. Merit-Mcbride Realtors, Inc*. (1987) 190 Cal.App.3d 1496, 1501 [lender awarded attorney's fees pursuant to clause in deed of trust for fees incurred successfully defending against the borrower's action to enjoin foreclosure sale]; *Buck v. Barb* (1983) 147 Cal.App.3d 920, 924–925 [lender awarded attorney's fees pursuant to clause in deed of trust allowing fees "to 'protect the security' " where the lender successfully defended against the borrower's action for declaratory relief and an injunction to stop a foreclosure sale].)

Here, First Tech successfully defended against the Hogans' claim for foreclosure of their asserted vendee's lien (first cause of action in their third amended complaint) to protect its interest in the security. It successfully defended against claims for injunctive relief to enjoin the foreclosure sale (third cause of action of the FAC) and wrongful foreclosure (fourth cause of action of the FAC). And it successfully defended against the Hogans' interim appeal in *Cenlar*. First Tech is entitled to attorney's fees under the fee provisions in the HELOC and deed of trust. Therefore, we reverse the trial court's orders

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"did not breach the terms of either the Cenlar or First Tech promissory notes and deeds of trust" (second cause of action in the third amended complaint) was also a claim on the HELOC contract.

denying First Tech's motions for attorney's fees and remand for a determination of reasonable attorney's fees.

f. *First Tech's Request for Attorney's Fees in Prosecuting Its Own Cross-Complaint is Premature*

First Tech also argues it is entitled to attorney's fees incurred in pursuing its lawsuit against the Hogans. We reject this argument because its claim for unsecured debt has not been resolved. Any award for attorney's fees related to First Tech's cross-complaint "must wait until the lawsuit is completely and finally decided." (*Presley*, *supra*, 146 Cal.App.3d at p. 961.)

4. Costs

In *Cenlar, supra,* at page 6, we dismissed the Hogans' appeal and awarded costs to the respondents including First Tech. On April 20, 2017, First Tech filed a memorandum of costs on appeal seeking $877.

On May 4, 2017, First Tech filed a memorandum of costs seeking $4,513.69. The Hogans filed a motion to strike and/or tax costs arguing, among other things, that First Tech failed to segregate deposition costs related to First Tech's cross-complaint.

The trial court denied First Tech's request for costs on appeal on the ground "[j]urisdiction on this phase of the litigation is in the First District Court of Appeal." The court ruled on First Tech's memorandum of costs as follows. "First Tech's request for costs after their successful Motion for Summary Judgment as to Count 1, and Plaintiffs voluntary dismissal of Count 3,[40] is Granted in Part and Denied in part. The Court finds First Tech was the prevailing party as to Plaintiffs' Complaint. However, First Tech's costs bill does not specify which costs were incurred in defeating Plaintiffs' Complaint as opposed to what was incurred in unsuccessfully litigating its Cross-Complaint. The Court awards First Tech $60 for its filing fee for the Summary Judgment Motion. All other filing fees and motion fees are denied as not related to the Demurrer or Summary Judgment Motion."

[40] It appears the trial court meant the Hogans' second cause of action for declaratory relief. Their third and fourth causes of action were not asserted against First Tech.

a. *First Tech is Entitled to Costs Incurred in the* Cenlar *Appeal*

First Tech claimed costs that we awarded in the *Cenlar* appeal, and it properly filed its memorandum of costs with the trial court. (Cal. Rules of Court, rule 8.278(c)(1); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 14:96, p. 14–20 ["the appellate court's remittitur simply specifies *who* is entitled to costs"; "[t]he actual assessment and recovery of costs occurs in the trial court . . . ."].) Accordingly, the trial court's order denying First Tech's costs on appeal from *Cenlar* is reversed and remanded for the trial court to determine reasonable costs.

b. *First Tech is Entitled to Some Additional Costs Incurred in Defending Against the Hogans' Lawsuit*

"If items on their face appear to be proper charges, the verified memorandum of costs is prima facie evidence of their propriety, and the burden is on the party seeking to tax costs to show they were not reasonable or necessary. 'On the other hand, if items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs.' (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266.)

"The trial court's exercise of discretion in granting or denying a motion to tax costs will not be disturbed if substantial evidence supports its decision." (*Jewell v. Bank of America* (1990) 220 Cal.App.3d 934, 941.)

First Tech argues on appeal that the "manifest injustice" of the court's ruling on costs is "readily seen when one considers," among other things, that First Tech did not file its cross-complaint until May 7, 2015, while several receipts attached to the memorandum of costs were dated prior to that filing, and that "First Tech was only able to successfully win summary judgment on the Hogans' lien claim by extensive use of their deposition admissions."

First Tech's argument appears to be well-taken. A review of its separate statement of undisputed facts and supporting evidence filed with its motion for summary adjudication confirms that many of its undisputed facts were based on Ronald's and Victoria's deposition transcripts. We also note that First Tech must have incurred at least some additional filing costs other than $60 for its motion for summary adjudication. (See Gov.

Code, § 70612 [uniform filing fee for filing the first paper in an action is $355].) Accordingly, we reverse the trial court's order awarding $60 in costs and remand for a determination of reasonable costs.

5. Remand

Finally, First Tech asserts this matter should be presided over by a different judicial officer on remand. First Tech argues the trial court's handling of bifurcation, its comments during the Hogans' testimony, its limitation of what First Tech could ask the Hogans, and other rulings created an appearance of bias. First Tech, however, does not claim the trial court *actually* acted out of bias.

As support for its request for a different judicial officer on remand based on the "appearance" of bias only, First Tech cites *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994 (*Haluck*). In *Haluck,* the Court of Appeal concluded the trial court's conduct during a 30-day jury trial was "sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial." (*Id*. at p. 997.) The record showed ex parte contacts between the judge and defense counsel and ongoing "lack of courtesy and decorum." (*Id*. at pp. 1002–1003, capitalization and italics omitted.) The appellate court described the judge's behavior, which included referring to one of the plaintiff's "poker face," as "inappropriate conduct that mocked plaintiffs and their testimony and impugned their credibility." (*Id*. at p. 1007.)

The *Haluck* court explained, "In conducting trials, judges ' "should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other." [Citation.]' [Citation.] Their conduct must ' " 'accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality[.]' " ' " [Citation.] ' "The trial of a case should not only be fair in fact, . . . it should also appear to be fair." ' [Citation.] The judge's actions and comments during trial violated these principles such that ' "it shocks the judicial instinct to allow the judgment to stand." [Citation.]' " (*Haluck, supra,* 151 Cal.App.4th at p. 1002.)

First Tech's reliance on *Haluck* is misplaced. There was no remotely similar conduct by the trial court in this case. Nor was there any risk that the trial court's conduct could bias jurors since First Tech's claims were tried by the court.

The other cases cited by First Tech do not support its position either. *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237 was disapproved of by the California Supreme Court in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, footnote 4. And the *Freeman* court described *Catchpole* as "involve[ing] a pattern of conduct by the judicial officer that rendered a fair trial impossible" (47 Cal.4th at p. 1006, fn. 4), but even First Tech does not claim the trial court's conduct in this case rendered a fair trial impossible. Finally, *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104, merely addressed the standards for disqualifying a judge. Under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." But First Tech has not offered any facts that would cause a person to reasonably entertain a doubt about the trial court's impartiality in this case.

We reject First Tech's request that we order a different judicial officer preside over the matter on remand.

## DISPOSITION

The orders sustaining First Tech's demurrer without leave to amend and granting its motion for summary adjudication are affirmed.

The "judgment after court trial," filed April 5, 2017, is reversed as to the grant of nonsuit of First Tech's claim for unsecured debt, and the matter is remanded for proceedings consistent with this opinion to determine liability and, if applicable, damages. The "order after hearing on posttrial motions for attorney fees," filed July 19, 2017, and the "order after hearing on Plaintiffs' motion to strike or tax costs," filed August 4, 2017, are reversed and remanded for further proceedings consistent with this opinion.

First Tech is awarded costs on appeal incurred in the Hogans' appeal. The parties shall bear their own costs on appeal incurred in First Tech's cross-appeal.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A151266, A152170, *Hogan v. First Technology Federal Credit Union*